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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,

v.

PRO FOOTBALL, INC.,
WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

Of Counsel:

STEPHEN A. BOKAT
ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Suite 1500, North Lobby
Washington, D.C. 20004-1790
(202) 637-3000

ZACHARY D. FASMAN *
NEAL D. MOLLEN
JENNY C. WU
PAUL, HASTINGS, JANOFSKY & WALKER
1299 Pennsylvania Ave., N.W.
Tenth Floor
Washington, D.C. 20004-2400
(202) 508-9500

Counsel for Amici Curiae Chamber of Commerce of the United States of America and National Association of Manufacturers

* Counsel of Record

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QUESTION PRESENTED

Whether members of a multi-employer bargaining unit are subject to antitrust liability for jointly exercising, during the collective bargaining process, economic weapons authorized by the federal labor laws?

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This Brief is submitted by the Chamber of Commerce of the United States of America (the "Chamber") and the National Association of Manufacturers ("NAM"), as *amici curiae* in support of respondents.[1]

INTEREST AS AMICI CURIAE

1. The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 220,000 businesses, trade and professional organizations and state and local chambers of commerce, and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in more than 300 cases of importance to the business community. Those cases include *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988); *Golden State Transit Corp. v Los Angeles*, 475 U.S. 608 (1986); *Connell Constr. Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); and *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965).

2. The NAM is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 mem-

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[1] The Chamber and the NAM have received the written consent of the parties to the proceeding below to file this Brief as *Amici Curiae*. Copies of these letters are on file with the Clerk of the Court.

ber companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent of all manufacturing workers and produce over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council. The NAM has regularly participated in cases before this Court raising important labor relations and antitrust issues, including *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974); and *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

3. A substantial number of the members of both the NAM and the Chamber (collectively "the *amici*") engage in multi-employer and other forms of coordinated bargaining. Multi-employer bargaining in this country is "as old as the collective bargaining process itself," and dates to at least the eighteenth century. M. Derber, *Employers Associations in the United States* in *Employers Associations and Industrial Relations: A Comparative Study*, 79 (J.P. Windmuller & A. Gladstone eds., Oxford 1984). It is the dominant form of labor negotiations in many sectors of the economy, and is important on a national or regional basis in many others. Employer-members of the *amici* in the garment, transportation, printing and publishing, mining, retail, construction, maritime, retail food, restaurant, hotel, and building services businesses engage in multi-employer bargaining on a local, regional, or national basis.

4. The court of appeals below held that the non-statutory labor exemption to the Sherman Act insulates from antitrust liability economic self-help taken by members of a multi-employer bargaining association in the bargaining process once a bargaining impasse has been reached. This result, we believe, is required by the structure of the National Labor Relations Act and the decisions of this Court interpreting that statute, and is consistent with this Court's decisions accommodating the antitrust laws with conflicting statutory schemes.

5. The NLRA encourages the "practice and procedure of collective bargaining," 29 U.S.C. § 151, by creating a system of private industrial dispute settlement in which the parties themselves are able to structure their relationships without government supervision. The Court has been scrupulous in forbidding federal, state or local interference with this congressionally mandated "free play of economic forces," whether that interference has been sought by labor or management, recognizing repeatedly that the threat and use of economic weapons by management and labor are essential to the system of private governance upon which our labor laws are premised. This system is inconsistent with the proposition advanced here by petitioners and their *amici*—that post-impasse imposition of the terms of the employer's final offer in bargaining—action plainly privileged under the NLRA—can form the basis for an antitrust action in the federal courts. If petitioners are correct, virtually every multi-employer bargaining dispute is likely to be resolved in a federal court treble damage antitrust action, instead of being settled privately by the contending parties without government interference.

6. Limitations on the utility of multi-employer bargaining are of particular concern to some of the smallest members of the *amici*. The parties in this case participate in a highly visible and lucrative economic enterprise that could hardly be more different from the typical multi-employer bargaining unit. As this Court quite accurately noted nearly forty years ago, the process of multi-employer bargaining became more prevalent after the Wagner Act of 1935 as smaller employers "sought through group bargaining to match increased union strength." *NLRB v. Truck Drivers*, 353 U.S. 87, 94-95 (1957). For small-scale manufacturers and for small employers in the restaurant, hotel, retail and printing industries, for example, the mutual aid and protection found in group bargaining is not merely beneficial, but can be essential for economic survival. For these relatively small enterprises, the arguments advanced by the petitioners and their *amici* pose particularly dire consequences.

STATEMENT

1. The professional football teams of the National Football League ("NFL") engage in collective bargaining with their players through a multi-employer bargaining association called the National Football League Management Council ("Management Council"). The players are represented in bargaining by the National Football League Players Association ("NFLPA" or "Union").

In 1989, the Management Council proposed to the NFLPA that each club in the league be permitted to establish a "developmental squad" for the purpose of retaining and training promising but inexperienced players who were not skilled enough to make the regular team rosters. The Management Council proposed that these players be paid at a uniform rate of $1000 per week.

Although the NFLPA was willing—indeed eager—to agree to the development squad concept, it adamantly refused to bargain with the Management Council on the subject of a collective wage rate for the players on such a squad. The NFLPA candidly told the Management Council that "all players, including developmental, should have the right to negotiate salary terms, *and no fixed wage for any group is acceptable to the NFLPA*." Pet. App. 7a (emphasis added.) Although the Management Council again tried to engage the NFLPA in negotiations over a collectively-bargained wage structure for the new developmental squads, *id.*, the NFLPA's intractable, institutional objections to collectively bargained wage rates soon produced an impasse.

The Management Council announced that in light of the bargaining impasse, it would implement unilaterally the offer it had made to the Union. Neither the petitioners nor the NFLPA filed an unfair labor practice charge with the National Labor Relations Board ("NLRB") challenging the right of the Management Council to take this action under the labor laws; indeed, it appears that the petitioners and their *amici* concede that the actions of the Manage-

ment Council were entirely consistent with the clubs' collective rights and obligations under the NLRA. Rather, the petitioners, a group of developmental squad players subject to the $1000 wage rate, filed this action under Section 1 of the Sherman Act against the NFL and each of the clubs challenging the Management Council's unilateral implementation of terms as an unlawful restraint of trade.

2. a. The clubs filed a motion for summary judgment in the district court, arguing that their concerted conduct was immunized from antitrust challenge by the so-called "non-statutory" labor antitrust immunity or exemption. The district court denied this motion, and granted petitioners' competing motion for summary judgment on this question. The district court found that the non-statutory exemption immunized the *product* of collective bargaining, *i.e.*, the agreement itself, but "question[ed] the wisdom" of applying the exemption to bargaining tactics adopted by a multi-employer association in the course of bargaining after the expiration of the previous agreement. Pet. App. 72a.[2] Opining that the procedures established by the NLRA for fostering successful collective bargaining negotiations had proven ineffective, the court concluded that the NLRA's bargaining procedures could profitably be supplemented with the spectre of antitrust liability: "The certainty that treble damages under the antitrust laws would attach after a date certain [to collective action by an multi-employer bargaining association] would create the atmosphere of economic certainty and urgency necessary for the parties to negotiate seriously and sign a new collective bargaining agreement." Pet. App. 73a-74a. The court subsequently found that the Management Council's action was a *per se* violation of the Sherman Act and, after a trial on damages, awarded petitioners

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[2] The district court thus also decided that under the Sherman Act, absent explicit Union permission, the clubs were prohibited from giving continuing effect to the terms of the expired collective bargaining agreement. Pet. App. 72a-80a.

$30.35 million in damages and attorneys' fees of $1.745 million. Pet. App. 9a.

b. The United States Court of Appeals for the District of Columbia Circuit reversed. In a panel decision written by Chief Judge Edwards, the court of appeals recognized that the fundamental goals of the Sherman Act and the later-enacted NLRA are, in important respects, antithetical to one another. The Sherman Act, the court noted, proscribes agreements in restraint of trade in order "to promote the national interest in a competitive economy." Pet. App. 3a, quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985). Conversely, the NLRA "contemplates collusive activity on the parts of both employees and employers," and was intended by Congress to foster agreements which collectively fix the price of labor in a particular company, or, in the multi-employer context, for employers throughout a given industry within a particular region or on a national basis. Pet. App. 3a, 25a.

Accommodating these disparate goals, the court of appeals carefully reviewed the system of private industrial governance embodied in the NLRA. As the court explained, the NLRA's obligation to bargain in good faith "is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole." Pet. App. 17a, quoting *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981). Because the availability of these "economic weapons" is a predominant feature of collective bargaining under the NLRA, the court properly concluded that imposing antitrust liability on a multi-employer bargaining association for using those weapons—conduct that is unquestionably privileged under the NLRA—"would both subvert national labor policy and exaggerate federal antitrust concerns." Pet. App. 29a. To accept the district court's rule, the court held, would be to hold "that hard bargaining by employers with unions violates the Sherman Act." *Id.*, quoting M. S. Jacobs & R. K. Winter, Jr., *Anti-*

trust Principles and Collective Bargaining By Athletes: Of Superstars In Peonage, 81 Yale L. J. 1, 27 (1971).

Finding that this Court's decisions had not definitively addressed the scope of the non-statutory exemption, Pet. App. 14a-15a, Chief Judge Edwards concluded that "the exemption must be broad enough . . . to shield the entire collective bargaining process established by federal law," Pet. App. 16a, and that "the nonstatutory labor exemption waives antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining." Pet. App. 29a.

c. Judge Wald dissented. Although apparently agreeing that the non-statutory exemption should protect the bargaining process, Judge Wald distinguished between "terms" of employment and 'tactics" of bargaining, finding that only the latter deserved antitrust protection. Pet. App. 50a-51a. While recognizing that post-impasse unilateral imposition "may qualify" as an economic pressure tactic intended to produce agreement, *citing American Ship Building v. NLRB*, 380 U.S. 300, 316 (1965), Judge Wald nonetheless rejected that possibility and concluded as a matter of law that unilateral implementation "is best understood not as a 'bargaining tactic' but as part of the employer's residual right to continue operating as dictated by business necessity once her statutory duty to bargain has been exhausted." Pet. App. 51a. Judge Wald concluded that bargaining ceases at impasse and therefore "at the point of impasse—when an agreement is no longer in sight or even being sought—immunity from antitrust liability for terms employers unilateraly impose should terminate." Pet. App. 60a.[3]

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[3] To our knowledge, no party in this case has addressed, below or in this Court, whether a multi-employer bargaining association is a single economic unit beyond the reach of Section 1 of the Sherman Act, which applies only to contracts, combinations or agreements in restraint of trade between separate entities. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The

SUMMARY OF ARGUMENT

As the United States and the Federal Trade Commission (collectively referred to as "the United States" or "the Government") concede in their brief, if "there is a conflict between the labor laws and the antitrust laws such that both cannot be given full effect, the antitrust laws should yield to the more specific, and later enacted, obligations of the NLRA." Brief of the United States and the Federal Trade Commission as *Amici Curiae* Supporting Petitioners ("U.S. Br.") at 16-17. Application of the antitrust laws to the conduct at issue in this case would drive multi-employer bargaining disputes into the federal courts, thus frustrating fundamental precepts of national labor policy.

The federal labor laws authorize collective action by both labor and management to fix prices in the labor market, conduct that, absent exemption or immunity, normally would be illegal under the antitrust laws. The Court has repeatedly recognized that this inherently collusive and anti-competitive system of industrial dispute settlement created by Congress in 1935 can function only if the parties are free to act in their own self-interests and settle

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National Labor Relations Board has always "regarded . . . a multi-employer bargaining group . . . as *the employer for bargaining purposes.*" *Burgess Mining & Constr. Corp.*, 239 N.L.R.B. 92, 93 (1978) (emphasis added); *Shipowners' Ass'n of the Pacific Coast*, 7 N.L.R.B. 1002 (1938), *rev. denied on other grounds*, 103 F.2d 933 (D.C. Cir.), *aff'd*, 308 U.S. 401 (1940). Thus, for the limited purposes of negotiating with a common union, the members of an employer group form a single economic enterprise. Under these circumstances, it makes little sense to treat the members of the multi-employer group as disparate economic actors. *Cf. Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 356 (1982) ("[i]n . . . joint ventures, the partnership is regarded as a single firm competing with other sellers in the market"); *Williams v. I.B. Fischer Nevada*, 999 F.2d 445 (9th Cir. 1993) (Section 1 violation impossible where franchisor and franchisee form a single economic unit); *Mount Pleasant v. Associated Elec. Co-op*, 838 F.2d 268 (8th Cir. 1988) (members of rural electrical co-operative were single economic unit even though each was separately incorporated).

their disputes privately, without interference by any governmental authority. The Clayton Act's express exemption for union collective action, as well as the so-called "non-statutory exemption" at issue here, seek to harmonize the conflicting policies underlying the federal labor and antitrust laws by preserving a broad sphere within which both management and labor can act without legal interdiction under the Sherman Act.

Petitioners and their *amici*, while supposedly acknowledging the primacy of the collective bargaining process, in fact ask the Court to undercut this dispute resolution system by authorizing recourse to federal antitrust laws in the midst of labor disputes involving multi-employer associations. Their various claims—that management's right to impose the terms of its final offer following a bargaining impasse is a mere "common law" rather than federal statutory right, or that all "restraints of trade" contained in a bargaining agreement must be eliminated when the contract expires or an impasse is reached—all are founded on serious misconceptions about the bargaining process contrary to the teachings of this Court. If adopted by the Court, the rules petitioners posit would make commonplace federal court involvement in the give-and-take of multi-employer collective bargaining, something Congress plainly did not intend.

Petitioners and their *amici* apparently believe that organized labor should be free to agree to bargain on a multi-employer basis, reaping the benefits of union collective action by fixing wages and benefits on a broad scale, while at the same time denying the employers in a lawful competing association correlative rights to unit-wide self-defense. This transparently partisan reading of the non-statutory exemption would destroy multi-employer bargaining, is wholly inconsistent with federal labor policy and should be rejected by this Court.

ARGUMENT

I. THE BARGAINING PROCESS MUST BE INSULATED FROM ANTITRUST LIABILITY IF IT IS TO FUNCTION AS ENVISIONED BY CONGRESS

A. The Labor and Antitrust Laws Serve Irreconcilable Goals

"The purpose and effect of every labor organization is to eliminate competition in the labor market." A. Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 242, 254 (1955). Thus, trade unionism cannot be effective in achieving its principal goals "unless organization is co-extensive with the market and eliminates price competition based on differences in labor standards." *Id.* at 276, citing S. Webb & B. Webb, *Industrial Democracy* (1902); *see also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 (1940) ("an elimination of price competition based on differences in labor standards is the objective of any . . . labor organization").

These goals are antithetical to the central mission of the Sherman Act—"to promote the national interest in a competitive economy." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985). Nearly 90 years ago, this Court held that the Sherman Act "prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business." *Loewe v. Lawlor*, 208 U.S. 274, 293 (1908). And, until Congress passed the Clayton Act in 1914, the courts routinely held that labor unions were just this sort of combination in restraint of trade. *Id.; United States v. Debs*, 64 F. 724 (C.C.D. Ill. 1894), *aff'd on other grounds*, 158 U.S. 564 (1895).

The Clayton Act was a direct response to cases such as *Loewe*, and it explicitly excepted labor organizations from the scope of the Sherman Act's proscriptions. The Clayton Act's statutory exemption, however, did "not ex-

empt concerned action or agreements between unions and nonlabor parties." *Connell Constr. Co. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 622 (1975); *cf., Teamsters Local 167 v. United States,* 291 U.S. 293 (1934) (Clayton Act was not intended to immunize price-fixing agreement between union and businesses). Because every collective bargaining agreement is, by definition, such an agreement, application of the statutory exemption in the Clayton Act could not alone reconcile the intent of the antitrust laws with the aspirations of the 1935 Wagner Act—to foster "the practice and procedure of collective bargaining." *See* Section 1 of the NLRA, 29 U.S.C. § 151.

For this reason, in a series of decisions issued during the past 30 years,[4] this Court has created a non-statutory antitrust exemption designed to accommodate the federal policy of encouraging collective bargaining. As the majority below correctly observed, each of the Court's prior cases involved the scope of protection to be afforded a collective bargaining agreement. Pet. App. 13a-14a. From this, and from dicta found in these decisions discussing the need to protect collective bargaining agreements from antitrust challenge, petitioners and their *amici* unjustifiably conclude that the protections of the non-statutory exemption do *not* shield the bargaining *process,* but instead must be limited to collective bargaining *agreements.* This wooden and cramped reading of the non-statutory exemption fails to appreciate the central importance of the bargaining process and, in practice, would result in subverting congressional intent by forcing multi-employer labor disputes into antitrust litigation rather than resolving them through bargaining.

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[4] *See Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616 (1975); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965); *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1965).

B. The Process of Collective Bargaining Depends Upon the Ability of the Parties to Use the Forms of Self-Help Petitioners and Their Amici Seek To Proscribe

When it enacted the Wagner Act in 1935, Congress created a private dispute resolution mechanism through which management and labor could "establish . . . their own charter for the ordering of industrial relations." *Teamsters Local 24 v. Oliver*, 358 U.S. 283, 295 (1959). Rather than compelling agreement or prescribing some form of binding arbitration, Congress envisioned that under the Act "[d]isputes about wages, hours of work, and other working conditions [w]ould . . . be resolved by the play of competitive forces . . . ." S. Rep. No. 573, 74th Cong., 1st Sess., 2 (1935), *cited in Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 617 (1986) ("*Golden State I*").

Thus, "economic weapons in reserve, and their actual exercise on occasion by the parties [were intended to be] part and parcel of the system that the Wagner and Taft-Hartley Acts recognized." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960). Indeed, often "it [is] only fear of the economic consequences of disagreement that turns the parties to facts, reason, a sense of responsibility, a responsiveness to government and public opinion, and moral principle." *Id.* at 489-90. For this reason, the "use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the [federal] Act," but an essential attribute of the system of private dispute resolution Congress devised. *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Rel. Comm'n*, 427 U.S. 132, 149 (1976) ("*Machinists*") (quoting *Insurance Agents' Int'l Union*, 361 U.S. at 498).

Given the potential for pain inherent in the use of these economic weapons, however, it is not surprising that both management and labor repeatedly have sought refuge from their labor disputes in federal, state, and local regulatory schemes. In *Insurance Agents*, the employer asked the NLRB and this Court to condemn a work slowdown. In

American Ship Building Co. v. NLRB, 380 U.S. 300 (1965), *NLRB v. Brown*, 380 U.S. 278 (1965), and *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957) ("*Buffalo Linen*"), labor asked the NLRB and this Court to limit the right of employers to lock out their employees in a variety of situations. In *Machinists*, the employer obtained an order from a state labor relations commission condemning a concerted refusal to work overtime. And in *Golden State I*, at union request, the city council terminated the employer's license to do business when the company failed to acquiesce in the union's bargaining demands.

But in each instance, this Court concluded that the system of private dispute settlement could not work if the agencies of government could be enlisted as an ally in the economic arena, thereby directly or indirectly dictating the shape of the bargain. "Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left 'to be controlled by the free play of economic forces.' The Court [has] recognized . . . that 'Congress has been rather specific when it has come to outlaw particular economic weapons, and that Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance 'between the uncontrolled power of management and labor to further their respective interests.' " *Golden State I*, 475 U.S. at 614 (internal citations omitted). Within this realm of economic self-help, Congress intended that the parties be left "unrestricted by *any* governmental power to regulate." *Machinists*, 427 U.S. at 141 (emphasis in original). This rule of law "creates a free zone from which all regulation, 'whether federal or state' is excluded." *Golden State Transit Corp v. Los Angeles*, 493 U.S. 103, 111 (1989) ("*Golden State II*") (internal citation omitted.[5]

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[5] This Court's protection of the bargaining process also is evidenced in cases where the Court has been willing to tolerate the

The narrow reading of the non-statutory exemption advanced by the petitioners and the United States simply cannot be reconciled with these cases, or with these most basic precepts of federal labor law. Petitioners and the United States argue that employers' choice of economic weapons may become the substance of a federal treble damages suit even though those weapons, under the decisions of this Court and the NLRB, lie in the "free zone" from which all regulation is excluded. Indeed, it is quite apparent that petitioners are not interested in having the bargaining process work as Congress envisioned it, but seek a *substitute* for that process. In their brief, petitioners complain that, absent an antitrust action, an employer's implementation of terms could force a union to "take the risk of calling a strike . . . ." Pet. Br. 42. Of course, the NLRA was predicated on the threat and use of such weapons, and not on resort to federal litigation as a substitute for economic muscle. "[T]he Act . . . does not contemplate that unions will always be secure and able

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imposition of certain minimum labor standards under state law. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). These cases do not suggest, as petitioners maintain, that the antitrust laws should be read to condemn forms of self-help specifically authorized in the NLRA's bargaining scheme. Pet. Br. 27-30. As this Court explained in *Fort Halifax*, "the NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining. 'The evil Congress was addressing [in passing the Wagner Act] was entirely unrelated to local or federal regulation establishing minimum terms of employment.'" 482 U.S. at 20 (quoting *Metropolitan Life Ins. Co.*, 471 U.S. at 754). Thus, when a state exercises its traditional police powers to "establish[] a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act." *Id.* at 21 (quoting *Metropolitan Life Ins.*, 471 U.S. at 757). In this case, by contrast, petitioners argue that the Sherman Act should be read to regulate directly the "equitable bargaining process" the NLRA was enacted to ensure. Unlike minimum labor standards, which are clearly subject to the traditional police powers of the state, the use of self-help lies in a "free zone from which all regulation 'whether federal or State is excluded.'" *Golden State II*, 493 U.S. at 111 (quoting *Machinists*, 427 U.S. at 153).

to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970). Petitioners' preference for the litigation model over the bargaining model speaks eloquently of the manner in which they seek to "accommodate" the purposes of the two statutory regimes.

C. Post-Impasse Implementation of an Employer's Final Offer Is a Form of Economic Self-Help, Part of the Bargaining Process, and an Indispensable Tool for Forging Agreements

Because self-help plays an indispensable role in the operation of federal labor policy, petitioners are forced to concede that the antitrust laws do not, and should not, be applied to the collective bargaining process. Pet. Br. 40. Thus, they agree that even after contract expiration and impasse, the members of a multi-employer association may agree to hire replacement workers or lock out their employees—concerted actions in plain restraint of trade—without fear of antitrust liability. *Id.* They and their *amici* thus are forced to claim that post-impasse implementation of terms is qualitatively different from other bargaining weapons. No such difference exists.

• *"Terms" versus "Tactics."* The distinction advocated by Judge Wald below between immunized "tactics" and the "implementation of terms," recharacterized by petitioners here (*see* Pet. Br. 36), has been repudiated repeatedly by the NLRB, both in its decided cases and in representing its views to this Court.[6] In its brief in this

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[6] The Board's view on this point is authoritative. Congress "intended to leave to the Board's specialized judgment the resolution of conflicts between union and employer rights that [are] bound to arise" in the future. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409 (1982) (*"Bonanno Linen"*); *Buffalo Linen*, 353 U.S. at 96. In particular, balancing the various inter-

Court in *Bonanno Linen*, the NLRB recounted its experience with employer implementation:

> [I]mpasse permits the employer to place into effect those wage increases or benefits it has heretofore offered, an action (or the possibility of it) which may substantially shift the bargaining positions of the parties. *In [this use] of impasse as a bargaining tactic, the emphasis is toward achieving agreement rather than causing a permanent disruption in the relation.*

Brief for the National Labor Relations Board in *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 80-931 (Oct. Term 1980) at 22 (emphasis added; internal citation omitted).[7]

The Board's cases confirm that implementation of terms is an indispensable part of the bargaining process, intended to spur agreement, not to act as a substitute for it. In *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22 (1973), *enforcement denied on other grounds, NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974)—the decision which established the rule subsequently endorsed by this Court in *Bonanno Linen*—the Board noted that

> Once a genuine impasse is reached, the parties can concurrently exert economic pressure on each other: the union can call for a strike [, and] the employer can . . . make unilateral changes in working conditions if they are consistent with the offers the union has rejected . . . . *Such economic pressure usually breaks the stalemate between the parties, changes the*

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ests served by multi-employer bargaining and "assessing the significance of impasse and the dynamics of collective bargaining [are] precisely the kind[s] of judgment[s] [this Court] ruled should be left to the Board." *Bonanno Linen*, 454 U.S. at 413.

[7] Given the NLRB's prior representations to this Court, it is perhaps not surprising that the Board did not sign the United States' brief in this case, contenting itself with a cryptic expression of its views in an ambiguous and highly unusual footnote on the final page of the brief. U.S. Br. 27 n.10.

circumstances of the bargaining atmosphere, and revives the parties' duty to bargain.[8]

206 N.L.R.B. at 23 (footnotes omitted and emphasis added). Petitioners' assertion that implementation of terms is "principally designed" as a "one-sided substitute for a bargaining agreement" "rather than to influence the bargaining process," Pet. Br. 36, is thus at odds with established labor law principles.

We do not disagree that some unscrupulous employers might approach bargaining intent on avoiding agreement, and manipulate the bargaining process in order to impose terms, following impasse, that are predictably unacceptable to the union. This conduct, however, constitutes surface bargaining forbidden by the NLRA, conduct that the NLRB can fully remedy. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 741 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); *Lapham-Hickey Steel Corp.*, 294 N.L.R.B. 395 (1989), *enf'd*, 904 F.2d 1180 (7th Cir. 1990). It would be a serious error to interpret the antitrust laws on the assumption that some employers might act unlawfully where Congress has already outlawed that conduct and set in place a mechanism for obtaining a remedy.

Moreover, unions have a powerful economic weapon for dealing with such conduct—an unfair labor practice strike. This type of strike is an especially potent weapon because the employer cannot permanently replace the

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[8] *Accord Circuit-Wise, Inc.*, 309 N.L.R.B. 905, 921 (1992); *R.A. Hatch Co.*, 263 N.L.R.B. 1221, 1234 (1982); *Presto Casting Co.*, 262 N.L.R.B. 346, 354 (1982), *modified on other grounds*, 708 F.2d 495 (9th Cir. 1983), *cert. denied*, 464 U.S. 994 (1983); *Signatory Labor Committee of the Colo. Contractors' Ass'n*, 261 N.L.R.B. 1459, 1465 (1982); *see also Colorado-Ute Elec. Ass'n v. NLRB*, 939 F.2d 1392, 1404-05 (10th Cir. 1991) ("the employer may try to achieve the wage terms it desires by using its economic weapon of implementing at impasse"; the employer's "right to implement at impasse [is] one of its powerful tools for achieving its wage terms"), *cert. denied*, 504 U.S. 995 (1992).

striking employees, and they are entitled to backpay under appropriate circumstances. *See generally NLRB v. International Van Lines,* 409 U.S. 48, 50-51 (1972); *Orit Corp.,* 294 N.L.R.B. 695, 698 (1989), *enf'd mem.* 918 F.2d 225 (D.C. Cir. 1990). Even more important, many multi-employer bargaining associations are composed of small employers who share an economic position simply too precarious to withstand a significant strike by a powerful union. In this regard, the powerful professional sports leagues and the entertainment industry are not typical of the majority of employers in multi-employer associations, a form of bargaining that allows smaller individual employers to pool their economic power to combat large and powerful labor unions. *See Buffalo Linen,* 353 U.S. at 94-95. In such circumstances, far more prevalent than the sports leagues and the entertainment industry, an unfair labor practice strike alone is an overwhelming deterrent to improper manipulation of the bargaining process.

• *Impasse.* The United States here, and Judge Wald below, commit a similar error by positing that impasse concludes bargaining and thus places the implementation of terms outside of the bargaining process. The NLRB's traditional definition of impasse, previously endorsed by this Court,[9] is flatly contray to this view. The NLRB repeatedly has made clear that impasse does not result in a fundamental alteration of the relationship between the parties or a termination of the bargaining process. Rather, impasse is

> akin to a hiatus in negotiations. In the overall ongoing process of collective bargaining, it is merely a point at which the parties cease to negotiate and often resort to forms of economic persuasion to establish the primacy of their negotiating position. Moreover,

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[9] "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Bonanno Linen,* 454 U.S. at 412 (quoting *Charles D. Bonanno Linen Serv., Inc.,* 243 N.L.R.B. 1093, 1094 (1979)).

> the occurrence of a genuine impasse cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations . . . . Therefore, it is clear that an impasse is but one thread in the complex tapestry of collective bargaining, rather than a bolt of a different hue. *In short, a genuine impasse is not the end of collective bargaining . . . . [I]t is merely a momentary eddy in the flow of collective bargaining.*

Hi-Way Billboards, Inc., 206 N.L.R.B. at 23 (emphasis added); *see also Worldwide Detective Bureau*, 296 N.L.R.B. 148, 155 (1989) ("existence of an impasse does not insulate a party from the duty to bargain. When an impasse is reached, the duty to bargain is not terminated but only suspended." (footnote omitted)). As this Court has recognized, "in almost all cases [impasse] is eventually broken, through either a change of mind or the application of economic force." *Bonanno Linen*, 454 U.S. at 412. Petitioners, their *amici*, and the United States (and Judge Wald below) all err by asserting that impasse ends bargaining; instead, impasse is simply one more step down the road to an agreement. That road should not lead to the federal courthouse.[10]

• *Common Law versus Statutory Rights.* Finally, peittioners claim that unilateral implementation is outside the bargaining process because it is "not a 'right' conferred and protected by the NLRA. It is simply an exercise of

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[10] Indeed, if impasse signifies a conclusion of the bargaining process, the NLRB's continuing jurisdiction over the terms that an employer implements post-impasse could hardly be justified. It is undeniable, however, that under *NLRB v. Katz*, 369 U.S. 736 (1962), the Board *has* jurisdiction to ensure that the employer's post-impasse offers are consistent with its prior offers to the union. *Id.*, 369 U.S. at 745, 747 n.12. The purport of the *Katz* doctrine itself is that at impasse the duty to bargain is merely suspended and that neither the employer nor the union may take actions designed to frustrate the bargaining process or make agreement impossible. That is precisely what petitioners and their *amici* here would do, by placing the entire dispute at impasse in the hands of a federal court under an antitrust theory.

the employers' residual, common law rights to operate their businesses." Pet. Br. 34. Petitioners assert that because the right to implement "derives from the common law rather than the NLRA, subjecting the exercise of that right to the requirements of the Sherman Act presents no . . . conflict with . . . labor law . . . ." *Id.* at 35.

This claim is directly contradicted by the Court's decision in *Golden State II*, 493 U.S. at 112. There, the city had attempted to limit the taxi company's ability to "operate [its] business[]" by imposing a deadline on the resolution of the company's labor dispute with its union. When the employer did not meet the deadline, the city denied it the license necessary for it to stay in business. This Court explicitly held that "the interest in being free of governmental regulation of the 'peaceful methods of putting economic pressure on one another' *is a right specifically conferred . . . by the NLRA.*" *Id.* (footnote omitted and emphasis added). More particularly, this Court held that *the very right petitioners disparge here, i.e.*, an "employer['s] . . . right to operate [its] business[]" was a right conferred and protected by the NLRA, and that the city's attempt to interfere with that right was preempted by the NLRA. *Id.*[11]

In short, none of the various rationales offered by petitioners, their *amici* or Judge Wald below in any way

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[11] Petitioners' claim that this is a "common law" right, as opposed to a federal statutory right, appears to be premised on the lack of any explicit statutory reference to that right in the text of the Act. As this Court noted in *Golden State II*, 493 U.S. at 111-12,

> that might well also be said with respect to any number of rights or obligations that we have found implicit in a statute's language. A rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute. The violation of a federal right that has been found to be implicit in a statute's language and structure is as much a "direct violation" of a right as is the violation of a right that is clearly set forth in the text of the statute.

establish that post-impasse unilateral implementation of an employer's final offer is either outside of the bargaining process or is in some character so unique as to be the proper subject of antitrust liability. If the non-statutory exemption is designed to protect the collective bargaining process, as petitioners properly concede, that protection must also extend to post-impasse implementation of an employer's final offer.

II. IMPLIED IMMUNITY FOR SELF-HELP BY MEMBERS OF AN EMPLOYER ASSOCIATION MUST BE AVAILABLE THROUGHOUT THE BARGAINING PROCESS

A. Application of Antitrust Immunity to the Bargaining Process Is Consistent With This Court's Antitrust Decisions

Contrary to the United States' contention, protection of the entire bargaining process under the non-statutory labor exemption does not conflict with this Court's other antitrust immunity opinions. The Court has regularly immunized conduct otherwise arguably prohibited by the Sherman Act whenever necessary "to make [a subsequent statutory process] work," as for example, when the second statutory regime establishes "a regulatory agency . . . empowered *to authorize* or require the type of conduct under antitrust challenge." *National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 389 (1981) (emphasis added) (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)). As the leading commentators in the antitrust field have explained, immunity must extend beyond the sort of direct conflict demanded by the United States to "conduct which the statute [here, the NLRA,] expressly or impliedly allows or assumes." P. Areeda & D. Turner, *Antitrust Law*, ¶ 224a at 145 (1978). The United States' contrary claim here —that an antitrust exemption is appropriate only when two statutes create an unavoidable conflict by requiring inconsistent actions—cannot be reconciled with the Court's holdings.

Indeed, the United States took a very similar posiiton, and was corrected by the Court, in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975). There, the Court concluded that certain price-fixing agreements contained in the rules of the New York Stock Exchange ("NYSE") were immune from antitrust challenge because the NYSE had been authorized by the Securities and Exchange Commission ("SEC") to promulgate rules on the topic, and because the SEC exercised supervisory authority over the NYSE and its rules. The United States had argued that immunity was inappropriate because the specific kind of rule under review was not compelled by the SEC and thus was not "necessary to make [the competing statute] work." The Court held that a broader question was determinative: "[W]hether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by Congress." *Id.* at 688. Because the antitrust laws would condemn as *per se* violations the commission rates explicitly approved through the Exchange Act's system of "[s]upervised self-regulation," the Court held that immunity was appropriate. *Id.* at 691. *Accord United States v. National Ass'n of Securities Dealers*, 422 U.S. 694 (1975).

Under the appropriate legal standard, the case for implied immunity in this instance could hardly be more apparent. As this Court noted in *Buffalo Linen*, Congress has long recognized that multi-employer bargaining is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." 353 U.S. at 95. The Court has also recognized that to foster this form of bargaining, Congress "intended to leave to the [NLRB's] specialized judgment the resolution of conflicts between union and employer rights that were bound to arise in multiemployer bargaining." *Bonanno Linen*, 454 U.S. at 409.

In pursuing this "vital" aspect of national labor policy, the NLRB has adopted rules which "reflect an increasing emphasis on the stability of multiemployer units." *Id.* at 410. Of particular significance in this case, the Board has

concluded that "it is precisely at and during impasse, when bargaining is temporarily replaced by economic warfare, that the need for a stable, predictable bargaining unit becomes acute in order that the parties can weigh the costs and possible benefits of their conduct." *Id.* at 410-12 and n.8. And to safeguard the integrity of the multi-employer unit, the Board (with the approval of this Court) has authorized the members of a multi-employer unit to take concerted self help to defend the integrity of the unit and to advance their concerted bargaining goals. Thus, this Court has explicitly approved unit-wide lockouts and the unit-wide use of temporary replacements. *See NLRB v. Brown,* 380 U.S. 278, 283-85 (1965) (multi-employer group may lawfully lockout employees on a unit-wide basis and replace them with temporary workers); *Buffalo Linen, supra.*

These are fundamental aspects of national labor policy, established by the NLRB and ratified by this Court. The United States however, *fails even to cite Buffalo Linen,* and it cites *Brown,* in a footnote, for the breathtaking proposition that while employers in organized sports may be able to defend activities similar to the lockout/replacement in *Brown* under a "rule of reason" test, for employers in other industries—presumably including the retail food business at issue in *Brown*—this conduct "would constitute a *per se* illegal concerted refusal to deal." U.S. Br. 18 n.5. Thus, the Government makes no attempt to reconcile its unprecedented attack on multi-employer bargaining with this Court's statement in *Brown* that the multi-employer group's unit-wide concerted self-help was "wholly consistent with a legitimate business purpose . . . [*i.e.*,] a measure reasonably adapted to the achievement of a legitimate end—preserving the integrity of the multi-employer unit." *Brown,* 380 U.S. at 285, 289 (footnote omitted). The position advocated by the United States would effectively disarm employers in this contest of economic wills, and thus disrupt the statutory scheme envisioned by Congress.

Indeed, the Government's insistence that implied immunity is appropriate only in instances of direct, unavoid-

able conflicts proves too much, because it would make the very existence of multi-employer bargaining groups illegal. Multi-employer bargaining is entirely voluntary; no employer is compelled to join a multi-employer association. Thus, an employer could comply with its NLRA obligations (by bargaining one-on-one with its union) *and* could simultaneously obey the Sherman Act's edict against agreements in restraint of trade *without* having to invoke an implied antitrust immunity. That the NLRA *authorizes* the existence of multi-employer groups—even encourages them as a "vital" aspect of national labor policy—should not, if the United States' view of implied immunity is correct, be sufficient to permit the inherently anticompetitive conduct of multi-employer bargaining. The United States' acknowledgment that multi-employer groups are lawful, and its concession that these employer groups can even engage in concerted conduct prior to impasse, must be read as a tacit admission that its asserted rule of direct conflict immunity is too restrictive.[12]

B. The Labor and Antitrust Rights of Employees Can Be Given Full Effect While Giving Employer Groups the Right To Act for Mutual Aid and Protection

The United States excoriates the majority below for assertedly requiring employees to chose between rights under the NLRA and those protected by the Sherman

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[12] Paradoxically, the position advocated by the United States, born of evident antipathy for concerted employer conduct, almost certainly would make such conduct more commonplace. Because employers in the multi-employer groups would know that at impasse they will be disabled from engaging in concerted self-selp, there would be an almost inexorable desire to use it *prior* to impasse, while fruitful negotiations are ongoing. In this setting, the Government's rule would act as a durational limit on the employers' self-help, something this Court explicitly condemned in *Golden State I*: "[t]he bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of self-help . . . . The city's insistence on a settlement is pre-empted [because] the city [entered] into the substantive aspects of the bargaining process to an extent Congress has not countenanced." 475 U.S. at 615-16 (footnote and internal quote omitted).

Act. This claim overlooks the fact that multi-employer bargaining is entirely voluntary. No union is ever compelled to consent to it, and no employer (except during bargaining) can be held in a multi-employer group against its will. *Bonanno Linen,* 454 U.S. at 410-11; *Retail Assocs., Inc.,* 120 N.L.R.B. 388, 393 (1958); *see also Reliable Roofing Co.,* 246 N.L.R.B. 716 (1979); *General Ore, Inc.,* 126 N.L.R.B. 172 (1960).

Thus, members of a multi-employer bargaining unit are free to act in concert not by virtue of their employees' decision to organize, but by virtue of their union's voluntary decision to select the multi-employer bargaining form. Any claim to a non-statutory exemption would evaporate if the union chose not to bargain on a multi-employer basis. Petitioners, with the support of the United States, seek to reap the substantial benefits of multi-employer bargaining while simultaneously preventing employers from taking the forms of concerted self-help absolutely essential to maintaining the integrity of the multi-employer process. We believe unions choosing the benefits of multi-employer bargaining should shoulder the associated burdens, including the increased strength arrayed against them through concerted employer conduct.

A union's voluntary decision to continue multi-employer bargaining even with these burdens is not surprising. The multi-employer process poses numerous advantages for both labor and management. Unions benefit because negotiations on a multi-employer (or even industry-wide) basis can "minimiz[e] their organizational expenses, and increas[e] their security against raid[s] by outside organizations." *See* Brief for the National Labor Relations Board in *American Ship Building Co. v. NLRB,* 64-255 (October Term 1965) at 29. Multi-employer bargaining reduces the union's negotiations costs, and eases the burden of contract administration. It also promotes industry-wide solutions to problems too complex or expensive for any single employer to take on alone, such as the ramifications of technological improvements, and it makes

it possible for small employers to grant certain employee benefits they could not afford to administer alone. Most importantly, however, multi-employer bargaining serves as the single most efficient mechanism for the union to achieve its prime objective: the "elimination of price competition based on differences in labor standards . . . ." *Apex Hosiery*, 310 U.S. at 503.

Employers, too, benefit from broad-scale bargaining. Employers also achieve economies of scale when they combine for a single set of negotiations, and can achieve industry-wide (or at least regional) solutions to structural problems. Small employers also achieve significant protections from union pressure through collective strength;[13] the association typically represents a mutual aid pact to prevent the member companies from being "whipsawed." Most fundamentally, however, by joining with their business competitors in a common labor agreement, employers can obtain protection from "competitive disadvantages resulting from non-uniform contractual terms" setting their labor costs. *Buffalo Linen*, 353 U.S. at 96.

Thus, like the employee combinations explicitly exempted from antitrust scrutiny by the Clayton Act, and the employer-union agreements immunized by the non-statutory exemption recognized in *Jewel Tea* and *Pennington*, the combination of employers in multi-employer groups *assumes*—indeed *depends*—on collusion among business competitors in the negotiations process. Petitioners cannot be permitted to extract all of the benefits of this process while preventing employers from exercising the forms of self-help that make the process work.

C. Antitrust Immunity Must Extend Beyond Contract Expiration

Petitioners' redesign of the labor laws is not limited to denying self-help to the employer group. Like

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[13] *See Bonanno Linen*, 454 U.S. at 409 (employers "sought through group bargaining to match increased union strength" (quoting *Buffalo Linen*, 353 U.S. at 94-95 (footnote omitted)).

the district court, petitioners argue that the employer group violates the Sherman Act if it continues in effect the terms of its labor agreement with the union beyond the contract's date of expiration. Pet. Br. 45-48. Accepting this proposition, however, would work a wholesale revision of federal labor law and would require this Court to reverse its opinion in *NLRB v. Katz*, 369, U.S. 736 (1962), which held that under Sections 8(d) and 8(a)(5), it is an unfair labor practice for an employer to *fail* to give effect to these terms unless and until impasse is reached. The Court has reaffirmed this principle at least twice in recent years, and each of these decisions would have to fall as well if petitioners' argument is to be accepted. *See Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991); *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988). Even the United States, in its brief supporting the petitioners, acknowledges that the petitioners' position simply "cannot be reconciled" with *Katz*. U.S. Br. 16.

Petitioners do not acknowledge the breadth of the alterations to basic principles of federal labor law they ask this Court to make; they insist that they seek, at most, incremental change. They note that in *Litton*, this Court carved an exception to the *Katz* rule, holding that there is no post-expiration obligation to comply with the arbitration clause in an expired agreement with respect to disputes that themselves arise after expiration. Similarly, the NLRB has recognized that it would be antithetical to the central role of self-help in the structure of the NLRA to insist that a union continue to honor a no-strike pledge contained in an expired contract or to demand that an employer honor an expired dues check-off or union security provision. *Litton*, 501 U.S. at 199.

Yet *Litton* explicitly reaffirmed the continuing validity of *Katz*. *Litton* and the Board cases it cites represent a careful accommodation of the *Katz* doctrine and its duty to bargain with the larger purposes of the Act. Petitioners, on the other hand, do not seek to reconcile the obliga-

tions of Section 8(a)(5) with other important policies of federal labor law; they seek to jettison the *Katz* doctrine altogether in the multi-employer context simply to achieve the right to bring a treble damages action under the antitrust laws. Nothing in *Litton* would support such a result.[14]

An additional problem is posed, but left unaddressed, by petitioners' rather unformed proposal. The terms implemented post-expiration by individual members of a multi-employer group necessarily would have their genesis in an agreement in restraint of trade—the joint bargaining proposals of the multi-employer bargaining association. Because the petitioners would have the non-statutory exemption expire with the contract, presumably, it would be a Sherman Act violation for the employers to implement the fruits of their prior conspiracy. Yet in choosing terms to implement, the various members of the employer group would be limited under *Katz* to the offers made by the multi-employer association on their behalf. For this reason, the terms the various employers actually implemented would be identical, or nearly so, and would find their genesis in a "conspiracy," albeit one that was lawful at the time.

This Hobson's choice would result in an antitrust claim each time terms are implemented, with plaintiffs citing as evidence the similarity in implemented terms and the fact that the members of the association continued to meet "in secret"—conspiring—with one another on future bargaining proposals. Multi-employer bargaining disputes would become commonplace topics for federal court litigation.

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[14] Employers find small comfort in the petitioners' fanciful assurance that "[i]f negotiations are advancing toward a new contract, . . . the employees are likely to consent to an extension of the employers' immunity." Pet. Br. 47. It would simply be untenable for this Court to establish federal labor policy predicated on the presumed charity of organized labor. It also would be naive to believe that labor would not use the Sherman Act (rather than the economic power derived from the solidarity of its members) as leverage in collective negotiations.

In sum, the court of appeals' decision establishes a prudent and sensible rule for preventing conflicts between national labor policy and the more general rules of antitrust liability. Petitioners, the United States, and the other *amici* urging reversal, conversely, offer a "dizzying array of options . . . not one of [which] makes the slightest sense under established labor law principles." Pet. App. 21a (footnote omitted). Those urging reversal disagree about the duration of the antitrust exemption (expiration versus impasse), the character and availability of various employer self-help rights (implementation versus lockouts), and the practical consequences of extending antitrust liability following contract termination. If the decision below represented a departure from settled antitrust practice, as petitioners and their *amici* contend, one would expect that they could all agree on a statement of the rule previously and uniformly applied. That they have not done so is telling evidence that the various rules they seek represent unprecedented departures from settled law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Of Counsel:

STEPHEN A. BOKAT
ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Suite 1500, North Lobby
Washington, D.C. 20004-1790
(202) 637-3000

ZACHARY D. FASMAN *
NEAL D. MOLLEN
JENNY C. WU
PAUL, HASTINGS, JANOFSKY & WALKER
1299 Pennsylvania Ave., N.W.
Tenth Floor
Washington, D.C. 20004-2400
(202) 508-9500

Counsel for Amici Curiae Chamber of Commerce of the United States of America and National Association of Manufacturers

* Counsel of Record

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